



with and processed by agents of the Defendants, who have improperly denied the application to Plaintiff's detriment.

### **JURISDICTION**

2. Jurisdiction in this case is proper under §310(c) of the INA [8 U.S.C. §1421(c)], 28 U.S.C. §§1331 and 1361, and 5 U.S.C. §701 *et seq.* Relief is requested pursuant to said statutes.

### **PARTIES**

3. Plaintiff Kehinde SABA-BAKARE ("Saba-Bakare") is a 47 year old male native and citizen of Nigeria. Plaintiff is a lawful permanent resident, who has resided in the United States as a lawful permanent resident since January 23, 1980. Plaintiff applied for Naturalization by filing a N-400 on September 16, 2003.
4. Defendant Tom Ridge is the Secretary of the United States Department of Homeland Security, and this action is brought against him in his official capacity. Effective March 1, 2003, the Department of Homeland Security assumed responsibility for the functions of the agency formerly known as the "Immigration and Naturalization Service." The Secretary of the Department of Homeland Security ("DHS") is now vested with "[a]ll authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws." 8 CFR §2.1(a).

5. Defendant District Director of the Houston District, United States Citizenship and Immigration Services (“USCIS”) is an official of the Department of Homeland Security delegated with supervisory authority over all operations of the USCIS within his District. 8 CFR §2.1(a). As will be shown, Mr. Saba-Bakare’s application for naturalization was properly filed with agents of the former INS, Houston District. Those agents and their functions are now within the delegated authority of the Defendant District Director, USCIS. He is being sued in his official capacity only.

### **VENUE**

6. Venue is proper in this court, pursuant to 28 U.S.C. §1391(e), in that this is an action against officers and agencies of the United States in their official capacities, brought in the District where a Defendant resides, where the Plaintiff resides, and where a substantial part of the events or omissions giving rise to Plaintiff’s claim occurred. More specifically, Plaintiff’s application for naturalization was properly filed with and was ultimately denied by the Houston INS District Director.

### **EXHAUSTION OF REMEDIES**

7. Plaintiff has exhausted all of his administrative remedies. Mr. Saba-Bakare, through his attorney, has administratively appealed the denial of his naturalization application pursuant to INA §336, 8 U.S.C. §1447. This administrative “appeal” was filed on May 6, 2004. On June 30, 2004, the aforementioned “appeal” was denied by the INS without a hearing. Thus, no further administrative proceedings are required and this

Court's jurisdiction is properly invoked pursuant to INA §§310(c), 336(b); 8 U.S.C. §§1421(c), 1447(b).

### **CAUSE OF ACTION**

8. Mr. Kehinde Saba-Bakare is a lawful permanent resident, who has resided in the United States as a lawful permanent resident since January 23, 1980. A Notice To Appear was issued on April 14, 2003, commencing removal proceedings against Plaintiff following a brief trip abroad.

(a) The Notice To Appear charges that Mr. Saba-Bakare is inadmissible under §212(a)(2)(A)(i)(I) of the Immigration and Nationality Act [8 U.S.C. §1182(a)(2)(A)(i)(I)], as amended, in that he is an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude or an attempt or conspiracy to commit such a crime.

(b) The basis of this charge is a Texas conviction for sexual assault following a jury trial on October 24, 1990.

9. Mr. Saba-Bakare applied for Naturalization on September 15, 2003. Subsequently, his naturalization interview was set for Monday, April 5, 2004. Pending consideration of his naturalization application, Mr. Saba-Bakare had filed a motion to terminate removal proceedings pursuant to 8 CFR §1239.2(f), which authorizes the Immigration Judge to terminate proceedings to permit an application for

naturalization to proceed whenever the respondent is *prima facie* eligible for naturalization, and where the case involves “exceptionally appealing or humanitarian factors.”

(a) The regulation does NOT require the concurrence of the Immigration and Naturalization Service.

(b) However, in 1975 and under a different statutory process for naturalization, the Board of Immigration Appeals held that neither Immigration Judges nor the BIA itself could adjudicate *prima facie* eligibility for naturalization, and that such a finding had to be communicated to the Immigration Court by the INS *or a court* reviewing INS action. *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975).

10. On February 6, 2004, the Immigration Judge denied Mr. Saba-Bakare’s motion to terminate. The sole reason for the denial was that Citizenship and Immigration Services (“CIS”) had not confirmed Mr. Saba-Bakare’s *prima facie* eligibility for naturalization. On February 8, 2004, CIS submitted a Memorandum to the Immigration Judge, arguing that his “conviction” date was actually March 14, 1991, the date his sentence was imposed by the criminal court, and that he is therefore permanently barred from establishing the required good moral character because he has a conviction for an aggravated felony after November 29, 1990. INA §101(f)(8); 8 CFR §316.10(b)(1)(ii). No other reason was given for questioning Mr.

Saba-Bakare's eligibility for naturalization, and it must therefore be assumed that he is *prima facie* eligible if his "conviction" date is before November 29, 1990.

11. Plaintiff's naturalization was eventually denied on April 5, 2004, the day after his scheduled interview, on the same grounds asserted in the earlier memorandum submitted to the Immigration Judge, *i.e.*, that Plaintiff was convicted of an aggravated felony on or after November 29, 1990 and thereby permanently barred from establishing good moral character as a matter of law. 8 CFR §316.10(b)(1)(ii).
12. Plaintiff filed a timely administrative appeal to the denial of his application for naturalization pursuant to INA §336. 8 U.S.C. §1447. Defendants did not hold a hearing on the adverse decision despite Plaintiff's request. On June 30, 2004, Defendants affirmed, without a hearing, the unfavorable decision on the N-400 application.
13. Plaintiff was and remains *prima facie* eligible for naturalization since, at the time of filing his application for naturalization:
  - (a) Plaintiff speaks and understands English, is of good moral character during the period for which good moral character is required and is firmly attached to the principles of the United States Constitution. INA §316, 8 U.S.C. §1427.

(b) Plaintiff had been lawfully admitted to permanent residence, had resided in the United States for more than the requisite five years, and had met physical presence requirements for naturalization. *Id.*

(c) The grounds asserted by the INS in support of its denial –that the Plaintiff is barred from a finding of good moral character on the basis of a conviction before November 29, 1990 or continuing probation after this date- is not warranted by law and Plaintiff is eligible to naturalize. The conviction relied upon by USCIS occurred on October 24, 1990, thereby making the conviction outside the five year period for which good moral character must be shown. INA §316(a). The judgment signed by the criminal court expressly recites October 24, 1990 as the “date of judgment.” The fact that the sentence was imposed on March 14, 1991, following a pre-sentence investigation and appeals on sentencing issues, does not change the fact that all of the elements of a “conviction” - as set out in INA §101(a)(48)(A) - were met on October 24, 1990.

14. *Unless the adjudication of guilt has been withheld*, the term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court. INA §101(a)(48)(A). In the instant case, Mr. Saba-Bakare was found guilty by a jury of his peers, and a formal judgement of guilt was entered against him by the judge, on October 24, 1990. Therefore, the judgment issued by the court on October 24, 1990, falls under the aforementioned definition of a “conviction.”

15. Since Plaintiff's conviction date is NOT "on or after" November 29, 1990, he is not legally and permanently precluded from demonstrating his good moral character. 8 CFR §316.10(b)(1)(ii).

(a) All that is required is that he demonstrate good moral character for the statutory period of five years preceding his application for naturalization. INA §316(a), 8 U.S.C. §1427(a).

(b) This period of required good moral character therefore commences in September 1998, five years prior to the filing of Plaintiff's naturalization application in September 2003 and almost eight years after Plaintiff's sole conviction in October 1990.

16. The Service incorrectly relies on Title 8 CFR 316.10(c)(1) to preclude a finding of good moral character. "An applicant who has been on probation, parole, or suspended sentence during all or part of the statutory period is not thereby precluded from establishing good moral character." 8 CFR 316.10(c)(1). The above statute allows the Defendant to consider probation served in determining good moral character, but alone it cannot preclude a finding of *prima facie* eligibility for naturalization.

17. Plaintiff contends that the decision on his naturalization application was completely arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. Defendant has not made any attempt in determining good moral character through fact finding, instead it only espouses incorrect legal conclusions.



18. Plaintiff further contends that Defendants' conduct makes it abundantly clear that Defendants simply ignored Plaintiff's full compliance with the statutory residence requirement and they did not fairly consider his application for naturalization.
19. Plaintiff further contends that the actions of Defendants have materially harmed him the course of removal proceedings, by preventing the Immigration Judge from adjudicating his Motion to Terminate removal proceedings on its merits.
  - (a) The Board of Immigration Appeals has held that an Immigration Judge cannot consider the "exceptionally appealing or humanitarian factors" presented in his case unless the INS (now CIS) *or a court* represents to the Immigration Judge that the alien is *prima facie* eligible for naturalization. *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975).
  - (b) Plaintiff sincerely believes that his case presents such "exceptionally appealing or humanitarian factors" warranting termination of the removal proceedings, and that such proceedings would likely be terminated by the Immigration Judge as authorized by the regulations, but for the incorrect legal ruling by the Defendants.

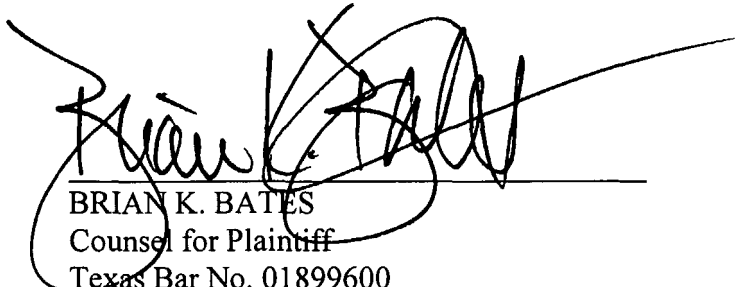
#### **PRAYER**

WHEREFORE, in view of the arguments and authority noted herein, Plaintiff respectfully prays that the Defendants be cited to appear herein and that, upon due consideration, the Court:

- (a) consider Plaintiff's naturalization application *de novo*, as authorized by INA §310(c), 8 U.S.C. §1421(c);
- (b) enter an order vacating the Defendants' denial of Plaintiff's naturalization application, and declaring that Plaintiff is *prima facie* eligible for naturalization;
- (c) order Plaintiff's application for naturalization remanded for further consideration by the Defendants under the correct legal standards;
- (d) order that Plaintiff be awarded reasonable attorney's fees; and
- (e) further order that Plaintiff be granted such other relief at law and in equity as justice may require.

Respectfully submitted,

QUAN, BURDETTE & PEREZ, P.C.



A handwritten signature in black ink, appearing to read 'Brian K. Bates', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

BRIAN K. BATES  
Counsel for Plaintiff  
Texas Bar No. 01899600  
5177 Richmond Ave., Suite 800  
Houston, Texas 77056  
(713) 625-9229 FAX: (713) 625-9292

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

Kehinde SABA-BAKARE

## DEFENDANTS

Hipolito ACOSTA

District Director, U.S. ICE,

and

Tom RIDGE, Secretary Dept. Of Homeland Security

(b) County of Residence of First Harris  
(EXCEPT IN U.S. PLAINTIFF CASES)County of Residence of First Listed  
(IN U.S. PLAINTIFF CASES ONLY)

H-04 4588

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
LAND INVOLVED.United States Courts  
Southern District of Texas  
FILED

DEC 07 2004

Michael N. Milby, Clerk

(c) Attorney's (Firm Name, Address, and Telephone Number)

BRIAN K. BATES

QUAN, BURDETTE &amp; PEREZ PC

5177 Richmond Ave. Suite 800

Houston, Texas 77056

Attorneys (If Known)

U.S. Attorney's Office

910 Travis, Suite 1500

Houston, Texas 77002

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☐ 1 ☐ 1 DEF Incorporated or Principal Place of Business In This State ☐ 4 ☐ 4 DEF
- Citizen of Another State ☐ 2 ☐ 2 DEF Incorporated and Principal Place of Business In Another State ☐ 5 ☐ 5 DEF
- Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 DEF Foreign Nation ☐ 6 ☐ 6 DEF

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input checked="" type="checkbox"/> 890 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

## V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

8 USC 1421 (c) Review of Naturalization application

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

12/7/04

